Supreme Court, U.S.
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No. 96-975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN CROSETTO,

Petitioner,

vs.

STATE BAR OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Respondent's Brief In Opposition ("Opp.") is a study in avoidance.

Respondent tries to avoid review by incorrectly describing the circuit court split identified in the Petition. That is why Respondent's Counterstatement to Question 1 (Opp. i) is so generalized, as that enables Respondent to avoid dealing with the precise question presented and the clear circuit split on that question.

But, no matter how hard Respondent tries, it cannot avoid one essential truth: the Seventh Circuit—unlike the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—is the only circuit court to rule that sovereign immunity can be granted to a claimed arm of the state without inquiring whether a money judgment against it—here about $3,000—will affect the state treasury.

This case thus presents an appropriate vehicle for the Court to decide these conflicting principles of constitutional law because they are not limited to the particular facts of this case. Rather, this case presents a straight yes or no answer to a legal question of national importance which is dividing the courts below and which will go on dividing them until the Court answers it.

This case also asks what procedural requirements unified bars must follow under *Keller v. State Bar of California,* 496 U.S. 1 (1990), and *Teachers v. Hudson,* 475 U.S. 292 (1986). This issue involves not only Wisconsin's 18,000 attorneys, but also all attorneys in the country's 35 or so unified bars.

Respondent also avoids mentioning what will happen if review is denied. Denial will enable Respondent to avoid changing its dues reduction plan which violates *Keller* and *Hudson.* Denial also will enable Respondent to avoid Petitioner's prevailing party status through a simple technicality: the Seventh Circuit's flat-out refusal to let Petitioner on the

remand add nominal defendants to counter Respondent's sovereign immunity claim.[1]

Given this experience, it is hardly likely that any other bar members in Wisconsin will sue over these or any other constitutional deprivations, just as it is unlikely that any attorney will step forward to represent them. That, not review, should be avoided.

I. This Case Presents The Circuit Court Split Identified In The Petition

A. Respondent's Manufactured Conflict Is Not The Real Conflict Between the Seventh Circuit And The Other Circuits

Respondent does not dispute that there is a circuit court split between Seventh Circuit and the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth,[2] and Eleventh Circuits over whether the federal courts must inquire into whether sovereign immunity can be granted to a claimed arm of the state if a money judgment—here about $3,000—is not paid out of the state treasury.[3] Respondent similarly does not dispute that the

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[1] Respondent also tries to avoid the truth by challenging the accuracy of Petitioner's Statement of Facts (Opp. 1), but thereafter only challenges one purported factual error. Opp. 7, n. 4. As related at pp. 9, 10, *infra*, it is Respondent who errs on this point, not Petitioner. Hence, every fact in Petitioner's Statement of Facts is true and should be accepted by the Court.

[2] The Tenth Circuit ruled in *Sonnenfeld v. City and County of Denver*, 100 F.3d. 744, 749 (10th Cir. 1996), that: "The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury." This decision supersedes *Esparza v. Valdez*, 862 F.2d. 788 (10th Cir. 1988), where the court reached a contrary conclusion. Pet. 18.

[3] Respondent does not dispute that a money judgment against it will not exceed about $3,000. Respondent instead only addresses the amount of

(continued...)

Petition accurately reports the current circuit court thinking on this issue and the Seventh Circuit's minority position. Pet. 17-21.

Instead, Respondent seeks to obfuscate the need for review by asserting that other circuit courts "have consistently held that the impact of a judgment on the state treasury is not the only factor to consider in determining whether a defendant is entitled to immunity under the Eleventh Amendment and that immunity may attach even in the absence of any fiscal impact if other factors are present." Opp. 11-12.

So what? Respondent knows that that is not the issue before the Court. Petitioner has never claimed that this is the only factor that all other circuit courts must consider. Rather, review is needed because the Seventh Circuit below, unlike every other circuit court, refuses to even consider this factor in determining whether an entity is entitled to sovereign immunity. Pet. 17-18. That is the real issue presented for review and that is the source of the circuit court split identified here.

Respondent therefore engages in a gross mischaracterization in baldly asserting: "The lack of meaningful conflict among the circuits is not surprising." Opp. 13. Since the phony conflict addressed by Respondent is not the real conflict raised in the Petition, its straw man is not relevant to the issue pending before the Court—an issue Respondent has chosen to duck by disingenuously raising a bogus issue and by thereby refusing to correctly identify the real circuit court split referenced in the Petition.

B. A Judgment Will Not Affect The State Treasury Because Respondent's Funds Are Not State Funds

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[3](...continued)
damages initially in dispute when class certification was being sought on behalf of Wisconsin's approximately 18,000 attorneys. Opp. 2.

Respondent errs in arguing that its funds are state funds and that review is not needed. Opp. 9, 15-16, n. 6.[4]

They are private funds. That is shown by Respondent's admissions that it purchased about $217,000 in private bonds with its own funds and without any state authorization; that it spent about $850,000 of its own funds in remodeling its building without any state authorization; that the state does not disburse any funds to it; that its funds are not part of the state budget; that it does not receive any general revenue funds from the state; and that membership dues are its prime source of income. (R. 510) ¶s 60-61. Hence, Respondent can use its own private funds to pay the approximately $3,000 money judgment sought here without affecting the state treasury.

C. Not All Of The Issues Herein Can Be Resolved In *Regents of the University of California v. Doe* Which Is Now Pending Before The Court

Respondent asserts that review should not be granted here because the Court in *Regents* (Case 95-1694) can "clarify how the impact on a state treasury figures into Eleventh Amendment jurisprudence . . .." Opp. 14-15, n. 6.

That, though, is not necessarily true. There is no dispute in that case that the University of California is an arm of the state

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[4]Respondent cites 48 Op. Atty. Gen. 30 (Wis. 1959) and 75 Op. Atty. Gen. 153 (Wis. 1986) in support of its claim that these are state funds. Opp. 9, 15. However, since Wisconsin's Attorney General has sometimes represented Respondent in the past, its opinions cannot be given much weight particularly where, as here, Respondent's status is a "federal question." *Keller*, 496 U.S. 11 (1990). In addition, Respondent's reliance on 75 Op. Atty. Gen. is wholly misplaced. It states: "In December of 1983, the Bar petitioned the Court to set up the State Bar as an 'official arm' of the court, acting in a quasi-judicial capacity . . .. The supreme court denied the petition . . ." *Id.* at 157. Hence, that denial establishes that Respondent is not an "official arm" of the Wisconsin Supreme Court. That being so, its funds are not state funds.

and that a legal judgment would run against the state. Here, on the other hand, Respondent has admitted: The bar is not a governmental entity" (Emphasis in original) (R. 510). Furthermore, Petitioners in *Regent* sought review over a circuit court split which centers on the effect of indemnification agreements and whether "the immunity of State entities under the Eleventh Amendment should be based solely on the legal liability of the state entity for the judgment" or whether "the immunity of State entities must be based on a prediction of the likely financial impact of a particular judgment on State resources."[5] Pet. 9.

Here, the Court is not being asked to review the circuit court split regarding indemnification agreements. Hence, there is no assurance that the Court will rule on this issue in *Regents*. Furthermore, review is still needed to address the other two Questions Presented which are not raised in *Regents*.

D. Review Is Needed To Resolve The Uncertainty Surrounding Sovereign Immunity

Respondent errs in asserting that there is no uncertainty over this issue. Opp. 13-14.

The Second Circuit in *Mancuso v. New York State Thruway Authority*, 86 F.3d. 289, 293 (2nd Cir. 1996), cert. denied, (Nov. 18, 1996), (No. 96-381), stated: "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best confused." The Fourth Circuit in *Gray v. Laws*, 51 F.3d. 426, 431 (4th Cir. 1995), stated that *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394 (1995), is "an opinion that is certain to generate confusion." In the Eighth Circuit, the dissenting opinion (Lay, J.) in *Hadley v. North Arkansas Community Technical College*, 76

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[5] Petitioners in *Regents* thus assert as their main argument that immunity does not depend on whether a state entity has a claim for reimbursement or indemnification against a third party. Pet. Br. 12.

F.3d. 1437, 1442 (1996), petition for cert. filed, 65 U.S.L.W. 3054 (June 24, 1996) (No. 95-2060), stated: "Today's decision amplifies the disarray of approaches applied by the lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities." Review is needed to answer such questions.

II. This Case Presents Questions Left Unaddressed In *Keller*

Keller held that unified bars should adopt "the sort of procedures described in *Hudson*," but it did not spell them out. 496, U.S., at 17. Review thus is needed to determine whether Respondent's plan is unconstitutional.

A. Respondent Does Not Dispute That Petitioner's Pending Constitutional Challenges Are Identical To Those Raised In 1992 And That They Are Covered By The Pretrial Order

Respondent does not deny that its dues plan violates *Keller* and *Hudson* because of its unlawful preclusion and exhaustion requirements. Pet. 27. Respondent also does not deny that these two constitutional challenges were first raised before the District Court in 1992 and that they are covered by the Pretrial Order. Pet. 27-29. Hence, they are not "new" claims.[6]

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[6]Respondent asserts that the District Court properly denied Petitioner's amendment because it raised new claims and new challenges to the current dues reduction plan. Opp. 18. However, Respondent does not identify these supposed claims or challenges for a very good reason: they do not exist. But, even if they did, they do not involve these two claims which have been pending since 1992. Respondent also asserts that these supposed new claims were already the subject of a parallel proceeding in *Thiel v. State Bar of Wisconsin*, 94 F.3d. 399 (7th Cir. 1996). Opp. 16-19. Respondent knows that is not true because *Thiel* did not involve the unconstitutional preclusion and exhaustion requirements found here. Hence, Petitioner could not have received the same legal relief in *Thiel* that he seeks here.

B. No Court Has Ever Ruled On The Substantive Merits Of Petitioner's Two Challenges

Respondent has not presented a counterstatement to Question 3. Opp., p. i, n.1. Instead, Respondent misleads the Court by asserting that the two challenges were decided adversely to Petitioner on his first appeal. *Id.* In fact, Respondent has stipulated that these challenges were dismissed on procedural grounds (i.e., that they were "moot" or not "ripe") and that neither the District Court nor the Seventh Circuit ever addressed their substantive merits. (R. 509), ¶6. Review therefore is needed because Respondent today is subjecting Wisconsin's approximately 18,000 attorneys to its unconstitutional dues reduction-arbitration plan.

C. Respondent's Other Practices Are Unconstitutional

Respondent does not dispute its record-keeping practices. Pet 5. It, instead, asserts that they are constitutional Opp. 10. Petitioner disagrees. It is manifestly absurd to claim that proper time records can be maintained when bar employees are not required to fill in and file their personal time sheets until up to 42 days after the fact.[7] Review thus is needed to determine whether unified bars under *Keller* can maintain such sorry practices.

III. Review Is Needed To Determine What Complaint Procedures Should Be Followed After A Circuit Court Raises A Sovereign Immunity Defense *Sua Sponte*

This issue involves all cases where, as here, a federal court raises a sovereign immunity defense *sua sponte* and then rules that a plaintiff cannot amend a complaint by naming nominal

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[7]Respondent admits that no auditor independently verified employee time records until after Petitioner raised this issue and that its auditor relies on Respondent's claims that its records are being properly kept. (R. 510) ¶11.

defendants for the purpose of preserving subject matter jurisdiction. The Seventh Circuit's decision here is manifestly unjust because it fails to recognize that a plaintiff in such a situation has the right to amend under Fed. R. Civ. P. 15 and because it prevents Petitioner from being declared a prevailing party.

Thus, Respondent does not dispute that Petitioner has brought needed changes in Respondent's unconstitutional record-keeping, time-keeping, and auditing practices and that it fired one of its employees because of the abuses uncovered in this litigation.[8] Pet. 5, 24-27.

Respondent similarly does not dispute that Petitioner needs to add the nominal defendants to the Complaint only to counter Respondent's belated sovereign immunity defense and to preserve his prevailing party status. It similarly does not dispute that all of those nominal defendants were nominal defendants in *Thiel* and that their addition here as nominal defendants is a "routine, ministerial task." Pet. 25.

Instead, Respondent argues phantom facts and wrongly asserts that the District Court did not abuse its discretion in denying this necessary amendment. This is a bogus argument. The Seventh Circuit ruled that, as a matter of law, the District Court had no discretion to exercise because: "Amendment would have been inconsistent with our mandate which required the resolution of one specific issue." Pet. App. 2a. The Seventh

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[8] Respondent asserts that Petitioner is precluded from raising these issues because the District Court decided that they were without merit and that its ruling is the "law of the case." Opp. 10. Its claim is without merit because this Court gave no reason for denying Petitioner's first petition for a writ of certiorari and thus never addressed the merits of Petitioner's claims. Hence, "questions that may have been decided do not become law of the case merely because they could have been decided . . ." 18 Wright, Miller & Kane, Federal Practice & Procedure § 4478 (1990).

Circuit did not offer an explanation as to why an amendment was prohibited on the remand after it raised a sovereign immunity defense *sua sponte*. Pet. App. 32a, n. 10. Its refusal to do so is in conflict with *Foman v. Davis*, 371 U.S. 178, 182 (1962) which requires such an explanation.

It also conflicts with *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952), where the Court allowed such an amendment under similar circumstances. Indeed, *Mullaney* is so on point that Respondent does not even try to distinguish it or even mention it.

IV. Respondent Is Not A State Entity Under *Keller* And It Is Not The Court's Agent

While Respondent now asserts that it is a state entity (Opp. 9-10) and that it is an agent of the court (Opp. 4-9), it does not dispute that it previously has represented: "The bar is not a governmental entity." (Emphasis in original.) (R. 509).

Respondent also admits that its funding does not come from the state legislature, but rather, through membership dues; that it does not admit, disbar, or suspend anyone from the practice of law; and that it does not have ultimate power to adopt a code of ethics. (R. 509) In short, it does not meet any of the criteria set forth in *Keller*, 496 U.S., at 11, for being a state agency.[9]

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[9]Respondent misrepresents the record by labeling as "false" (Opp. 7, n. 4) Petitioner's representation that Respondent "has never been told by the Wisconsin Supreme Court that it is free to disregard those procedures" which govern all Wisconsin state entities. Pet. 8. In fact, Respondent's Executive Secretary Stephen L. Smay, ("Smay"), was asked at his June 8, 1995, deposition: "And there is nothing in any of the [Supreme Court Rules] as far as you know that says the State Bar does not have to follow the other requirements established for other state agencies, isn't that correct?"

A I think that's correct. (R. 509), (Tab 30, p. 187).

(continued...)

Respondent's other assertion that it was an agent of the Wisconsin Supreme Court when it engaged in the activities in dispute was blown apart by Smay's admissions at another deposition. He admitted there were no Supreme Court Rules, decisions, or orders which authorized Respondent to establish LAWPAC, its political action committee; to conceal its LAWPAC activities; to force Petitioner to financially support LAWPAC; to maintain its record-keeping, time-keeping, and auditing practices; or to promulgate the exhaustion and preclusion requirements in issue.[10] (R. 503), (pp. 8-12).

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioner respectfully submits that the Petition for a writ of certiorari should be granted.

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[9](...continued)

Smay also admitted that there are no documents filed with either the state or federal governments which identify Respondent as a state entity and that there are no Rules promulgated by the Wisconsin Supreme Court which identify it as a state agency. *Id.* pp. 186-187.

[10]Respondent established LAWPAC after it was told by the Wisconsin Supreme Court that it was precluded from engaging in partisan politics and it continued its unlawful LAWPAC activities for three more years after the Wisconsin Supreme Court ruled they were "proscribed." *In re Regulation of the Bar of Wisconsin,* 81 Wis. 2d xxxv, xxxix (1978); *Matter of Discontinuation of Wis. State Bar,* 93 Wis. 2d 385, 387, 286 N.W. 2d 601, 606 (1980).